

# Scholars in mutual estrangement?

## Transformative constitutionalism meets law and development

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There is a curious estrangement between two scholarly communities that ought to have a lot in common: The first studies “transformative constitutionalism”, the second “law and development”. There is considerable thematic, geographical and methodological overlap between the two. Yet, the two strands of scholarship do not systematically connect. My argument in this post is that connecting the two approaches is productive because it confronts each side with its own blind spots.

Law and development is confronted with its *constitutional* blind spots: namely, its assumptions based on *liberal* constitutionalism, which does not hold in different contexts shaped by other constitutional varieties. Conversely, transformative constitutionalism is confronted with its *developmental* blind spots: Namely, the limits of court-centered rights litigation and the need to pay more attention to economic constitutionalism and political economy. Acknowledging these mutual blind spots opens avenues for future research that might undo some of the mutual estrangement between the two scholarly communities.

### ***Ships passing in the night?***

At first glance, law and development (L&D) and transformative constitutionalism (TC) seem to describe different legal phenomena and discourses. L&D is typically traced back to attempts by US-American agencies and scholars in the 1960s and 70s to modernize developing countries through externally assisted legal reforms inspired by liberal legalism. TC emerged since the 1990s in largely domestic processes of constitution-making and adjudication and is frequently conceived as a counter-concept to “Western” liberal constitutionalism. These different genealogies and postures may explain some of the estrangement between the two sides.

In substance, however, TC and L&D have much in common: Geographically, they both centre on Southern jurisdictions marked by low income and high inequality. Thematically, both are concerned with social change through law: Law and development is “concerned with the relationship between the legal systems and the ‘development’ – the social, economic and political changes – occurring in Third World countries”, as per David Trubek’s [seminal 1974 article](#). Transformative constitutionalism denotes “an enterprise of inducing large-scale social change through nonviolent political processes grounded in law”, as defined by Karl Klare in his [influential 1998 article](#). Methodologically, both share initial assumptions about the role of lawyers and courts as agents of social change, and both had to differentiate and contextualize these assumptions empirically with the help of interdisciplinary methods.

Given these parallels, L&D and TC appear like [ships passing in the night](#): They are sailing in the same ocean, in similar directions, but without communicating about their respective endeavours. It is thus time to turn on the position lights – if only to highlight each other's blind spots.

### ***L&D's constitutional blind spots***

Firstly, TC highlights *constitutional* blind spots of L&D. [Until recently](#), there has been relatively little engagement with constitutional foundations of L&D, and much of the literature used to assume a *liberal* constitutional framework, considering the only one to offer the conditions for capitalist development and economic growth.

The initial L&D movement [purportedly failed](#) because it was predicated on assumptions of liberal legalism that did not hold. The [1990s revival](#) occurred under the banner of “rule of law”, which transported a stripped-down version of liberal constitutionalism focused on independent judiciaries, separation of powers and protection of property rights. Even purportedly *private* economic institutions are conceived within a liberal constitutional framework: The corporation, for instance, is conceived as an institution of private law controlled by its capital investors, the shareholders, but this conception is in itself the result of a constitutional operation, namely the separation of the political and economic sphere constitutive of liberal constitutionalism and held key for market-driven economic growth.

These liberal assumptions, however, do not hold in different constitutional contexts, shaped by different varieties of constitutionalism. For one, there are obviously illiberal constitutional orders which offer functionally equivalent conditions for economic development, especially China or the early East Asian tigers. More importantly for our topic, TC posits different constitutional *ends* and *means* of development: It does not posit economic growth as the ultimate *end* of transformation, but rather emphasizes equality and inclusion. The *means* to achieve these ends involve an activist, redistributive state subject to positive constitutional obligations, state-owned enterprises and state-capitalist constitutional structures. This also blurs the liberal separation of politics and economics, as we shall see in the following part.

### ***TC's developmental blind spots***

Confronting TC with insights from L&D in turn highlights the *developmental* blind spots. TC initially carried a developmental promise: It pledged to transform highly unequal, exclusionary and often authoritarian societies into more egalitarian, inclusive and democratic polities. It thus enshrined transformative elements such as activist constitutional courts; social rights that impose positive obligations on the state; horizontal effect of rights among private parties; and an anti-formalist legal and interpretive culture. Presently, however, some of the initial enthusiasm about TC seems to be waning, as inequality persists and populist backlash looms large. L&D points to three conceptual problems of TC as currently conceived that may need to be tackled to go forward.

The first problem, or blind spot, concerns the *court-centrism* of TC, which obscures other actors of change. In most accounts of TC, courts are the decisive agents of transformation. However, L&D points to the truism that *courts* have a limited ability to enforce social change and depend on other actors to be transformative. Ultimately, TC requires activism from all branches of power *and* from progressive social forces. That doesn't mean that courts are irrelevant, but de-centers them and broadens the focus beyond social rights adjudication. In a similar vein, sophisticated L&D projects combine legislative reform, administrative capacity building, judicial strengthening, empowerment of civil society and work with the private sector. L&D scholarship has developed a toolkit of interdisciplinary methods to captures these complex interactions. This socio-legal toolkit would certainly help TC develop empirically grounded theories of change that can inform future research on transformative legal institutions.

The second blind spot concerns questions of economic constitutionalism, which TC scholarship seems to neglect. There is an inverse relationship between the frequent invocations of a telos of "economic justice", "redistribution", "substantive equality", "democratization of economic power" on the one hand, and rare discussions about concrete transformative economic arrangements on the other. Instead, much of the debate seems to focus on social rights litigation that forces the state to redistribute *public* resources. Much less attention is paid to what TC has to say about the economic system and economic institutions which determine the *initial distribution* in the first place. This is an omission, given that TC is not only conceived as a transformation of the state, but also of social relations.

At closer inspection, transformative constitutions do address the economy: The Brazilian constitution, for instance, contains an entire chapter on the economy, with constitutional principles of economic order that lay the foundations for a mixed economy, with a strong element of state capitalism. The constitutions of South Africa and India seek to tame private economic power through horizontal effect of constitutional rights, in line with the international debate on business and human rights. On the other hand, all transformative constitutions also protect private property rights and free enterprise to some extent, and they did not prevent past waves of privatization and liberalization. This raises two important questions for future research on TC: Firstly, are there some common economic elements of TC? Or is there too much variation so that the concept of TC is ultimately economically neutral? The second question concerns the effectiveness of these constitutional directives for economic order. Do courts enforce these provisions in a way that shapes economic reality? Does this matter at all in a globalized market economy?

A final blind spot concerns political economy and the interdependence of economic and political constitutionalism. While the failures of court-centrism seem unsurprising from a L&D perspective, the more interesting and puzzling question is why democratic institutions and universal franchise under transformative constitutions have not been yielding a more transformative *politics*. Scholars of TC often content themselves in emphasizing that economic and political rights are "intrinsically intertwined" (Klare 1998). But there is less reflection on structures of political economy that impede transformation, such as legal mechanisms that translate

economic power of entrenched elites into political power, and vice versa. This raises eminently constitutional questions about political representation and electoral systems, political parties and campaign finance, legislative process and public scrutiny – in short: the “law of democracy” of TC.

Courts have a role to play in developing and enforcing this law of democracy. A case in point is the jurisprudence of the Brazilian Supreme Court on corporate campaign finance: In a [2015 decision](#), the Court constitutionally banned direct campaign contributions by corporations, reasoning that economic power would otherwise threaten political equality. This *egalitarian* thrust [contrasts](#) with the more *liberal* approach of the American Supreme Court in its 2011 [Citizens United decision](#). How *transformative* this attempt at regulating political economy will be in practice remains an important question for future research.

## **Conclusion**

As a preliminary conclusion, we can say that confronting the blind spots of TC highlights conceptual weaknesses of the initial concept. If it is to be truly transformative, we cannot understand TC as the structural coupling of law and politics only. Rather, TC describes a triangular, interdependent relationship between the *legal*, *political* and *economic* system. The upshot for future research is that both TC and L&D ought to focus more on questions of economic constitutionalism and political economy, and thus overcome their mutual estrangement.

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